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Nos. 321, 322

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE CREEK NATION, PETITIONER

v.

THE UNITED STATES

THE SEMINOLE NATION, PETITIONER

v.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (Creek R. 12-21) is not yet reported.

JURISDICTION

The judgments of the Court of Claims were entered on June 1, 1942 (Creek R. 21; Seminole R. 12). The petition for writs of certiorari was filed August 21, 1942, and granted October 19, 1942. Jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as-

amended by the Act of May 22, 1939, 53 Stat. 752, 28 U. S. C. sec. 288 (b).

QUESTIONS PRESENTED

1. Whether the Creek and Seminole Nations may recover money damages from the United States for its failure and refusal to oust certain railroads from lands which the tribes granted the railroads for right of way and station purposes, but which the railroads have not fully paid for and have not devoted exclusively to railroad uses, and for its failure to bring suit against the railroads for moneys which might be due the tribes.

2. Whether the Court of Claims has jurisdiction of suits not based on a treaty or statutory obligation.

STATUTES INVOLVED

Articles I and V of the Treaty of March 21, 1866, 14 Stat. 755, between the Seminole Nation and the United States; Articles I and V of the Treaty of June 14, 1866, 14 Stat. 785, between the Creek Nation and the United States; Sections 13–16 of the Act of February 28, 1902, 32 Stat. 43; Sections 11 and 18 of the Act of April 26, 1906, 34 Stat. 137; Section 1 of the Seminole jurisdictional Act of May 20, 1924, 43 Stat. 133; and Section 1 of the Creek jurisdictional Act of May 24, 1924, 43 Stat. 139, are printed in chronological order in the Appendix, *infra*, pp. 29–40.

STATEMENT

The Seminole Nation, by Article V of the Treaty of March 21, 1866, 14 Stat. 755, 757, granted

"a right of way through their lands to any company which shall be duly authorized by Congress, * * * to construct a railroad from any point on their eastern to their western * * * boundary." And the tribe further agreed "to sell to * * * any company duly authorized as aforesaid, such [unoccupied] lands * * * lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such price per acre as may be eventually agreed upon between said Seminole nation and the party or parties building said road". The Creek Nation made a similar agreement with the United States in the Treaty of June 14, 1866, 14 Stat. 785, 787.

These treaties were subsequently implemented by special Acts passed in July 1866 authorizing two designated companies to construct railroads across Creek and Seminole lands (Act of July 26, 1866, 14 Stat. 289;[1] Act of July 27, 1866, 14 Stat. 292), and finally by a general statute ex-

[1] Section 10 provides:

And be it further enacted, That said Pacific Railroad Company, southern branch, its successors and assigns, shall have the right to negotiate with, and acquire title to land for railroad purposes from, any Indian nation or tribe authorized by the United States to dispose of lands, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States.

tending a like privilege to all duly organized railroad companies (Sections 13 *et seq.* of the Act of February 28, 1902, 32 Stat. 43, 47–51). The 1902 Act, beside providing for rights of way, permitted the railroads to acquire additional adjacent lands for station grounds and depots (not exceeding 200 feet in width and 2,000 feet in length) and for roundhouses, turntables, etc. (not exceeding 40 acres each) (sec. 14, Appendix, *infra*, pp. 33–34). Before railroads could be constructed, full compensation for the right of way and other lands was to be made to the individual or tribal owner thereof (sec. 15, Appendix, *infra*, pp. 34–36). If the parties were unable to agree on the amount of compensation, damages were to be ascertained by referees appointed by the United States district court, and either party could appeal from the award and receive a trial *de novo* in the district court (sec. 15). Each railroad company was also required to pay, for the benefit of the particular tribe through whose land the railroad was constructed, an annual charge of $15 for each mile of road (sec. 16, Appendix, *infra*, pp. 36–37).

There have been constructed, pursuant to the foregoing treaties and statutes, a number of railroads across lands which were originally owned by the Creek and Seminole Nations but which have since been largely allotted in severalty.[2]

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[2] The Creek Nation at one time held all these lands in fee simple, pursuant to the grant contained in the Treaty of February 14, 1833, 7 Stat. 417. *United States* v. *Creek*

In 1926 and 1930 the Creek and Seminole Nations filed suits in the Court of Claims (Creek R. 1; Seminole R. 1) to recover from the United States damages for an alleged misappropriation of land by the railroads, and for the alleged failure of the railroads to pay to the tribes the compensation prescribed by the statute of 1902. The petitions further alleged that the United States, as guardian or trustee of the Creek and Seminole Nations, had assumed complete control of the affairs of these tribes, and that the United States had failed and refused to recover the land and the compensation for the tribes.

The United States demurred to the petitions on the ground that the alleged cause of action did not arise under or grow out of a treaty or Act of Congress, and that the court was therefore without jurisdiction to consider the claims (Creek R. 1, 13; Seminole R. 1). Act of May 20, 1924, 43 Stat. 133; Act of May 24, 1924, 43 Stat. 139. These demurrers were ultimately sustained and the petitions dismissed on the authority of *Choctaw and Chickasaw Nations* v. *United States*, 75

Nation, 295 U. S. 103, 105. In the Treaty of June 14, 1866, Articles III, VIII, 14 Stat. 785, 786, 788, the Creeks ceded the westerly half of their domain to the United States, two hundred thousand acres of which were thereupon conveyed to the Seminole Nation pursuant to the Treaty of March 21, 1866, 14 Stat. 755. The Curtis Act of June 28, 1898, 30 Stat. 495, provided for the allotment of these tribal lands in severalty.

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C. Cls. 494, a case involving similar claims by those tribes (Creek R. 1, 13; Seminole R. 1).

In 1933, with leave of court, the Creek and Seminole Nations filed amended petitions (Creek R. 2; Seminole R. 1). This time they alleged, as their first cause of action, that it was the duty of the United States to supervise the railroad right of way grants contained in the treaties of 1866 and to protect the tribes in the quiet possession of their national domains; that two companies which were granted rights of way across the Creek and Seminole lands by the treaties and special Acts of 1866 had also appropriated additional strips of land containing approximately twenty acres each for station grounds; that these additional strips of land were not needed and were not used for railroad purposes and constituted an unauthorized intrusion by the railroads on lands owned by the tribes; and that the United States is liable to the tribes for damages resulting from the Government's failure to prevent these intrusions (Creek R. 2–5; Seminole R. 2–4).

For their second cause of action petitioners alleged that it was the duty of the United States to supervise the acquisition of railroad rights of way under the Act of February 28, 1902; that certain other companies had acquired rights of way under the 1902 Act; that the United States, in disregard of the provisions of that Act and of the Government's covenants of quiet possession contained in

the treaties of 1866, had permitted these companies to stake out additional 20-acre strips of land as station reservations; that these additional strips of land were not needed for railroad purposes and constituted an unauthorized intrusion by the railroads on lands owned by the tribes; and that the United States is liable to the tribes for damages resulting from its failure to perform properly its obligations under the treaties of 1866 and the Act of 1902 (Creek R. 5–7; Seminole R. 5–6).

For their third cause of action petitioners alleged that it was the duty of the United States to supervise the acquisition of rights of way under the Act of February 28, 1902; that certain companies had acquired rights of way under the 1902 Act; that the railroads had failed to compensate the tribe for these rights of way and to pay the annual charges, as required by Sections 15 and 16 of the Act of 1902; and that the United States is liable to the tribes for its failure to compel the railroads to comply with that Act (Creek R. 7–9; Seminole R. 6–8).

For their fourth cause of action petitioners repeated the allegations of their first and second causes, and then averred that it was the duty of the United States, under Section 11 of the Act of April 26, 1906, to collect all revenues of whatever character accruing to the Creek and Seminole Nations; that the railroad companies were permitted to rent the lands "unlawfully intruded upon" and

convert the rents to their own uses; and that for the violation of its duty to collect the rents derived from petitioners' land, the Government became liable for those amounts (Creek R. 9; Seminole R. 8).

And for their fifth and final cause of action petitioners repleaded the wrongs allegedly perpetrated by the railroads upon the tribes, and then averred that it was the duty of the United States, under Section 18 of the Act of April 26, 1906, to bring suits to recover moneys due the tribes, and that for its failure to bring such suits the United States became liable for the value of the lands of which petitioners have been deprived (Creek R. 10–11; Seminole R. 9–10).

To these amended petitions the United States again demurred, on the ground (1) that they failed to state facts sufficient to constitute causes of action against the United States; and (2) that the court was without jurisdiction, because the alleged causes of action were predicated upon the common law liability pertaining to the relationship of guardian and ward, and did not arise under or grow out of a treaty, agreement, or Act of Congress, as required by the special jurisdictional Acts of 1924 (Creek R. 12; Seminole R. 11). The court below sustained the demurrers on both grounds (Creek R. 12–21; Seminole R. 11), and accordingly dismissed the petitions (Creek R. 21; Seminole R. 12).

SUMMARY OF ARGUMENT

I

The Indians by treaty agreed to sell to authorized railroads strips of land on each side of the line of the railroad not exceeding three miles in width. Having so agreed, they cannot now be heard to claim that the railroads are trespassers even though it be said that the railroads are not using part of the land taken for railroad purposes. The United States, by covenanting in treaties with the Indians that in return for their agreeing to remain at peace with all other Indian tribes they would be guaranteed quiet possession of their country, did not make itself liable to respond in damages for injuries resulting from trespasses by third parties. *Nez Percé Tribe* v. *United States*, 95 C. Cls. 1, certiorari denied, 316 U. S. 686. The purpose was to assure petitioners they would be secure in their country from the encroachment of hostile Indians.

II

Congress, while providing in the Act of February 28, 1902, that the railroads should compensate the Indians for land taken and pay them, through the Secretary of the Interior, an annual charge per mile of railroad constructed, did not bind itself to assume the obligations of the railroads. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421.

III

Section 11 of the 1906 Act providing that revenues due the Five Tribes should be collected by a Government agent rather than by the tribal treasurers, passed at a time when the dissolution of the tribal governments was believed to be imminent, constitutes only an intragovernmental direction to officers of the United States. Cf. *The Sac and Fox Indians*, 220 U. S. 481. Congress did not intend by that Act to make the Government liable in the courts for all moneys which its officers failed to collect in the discharge of their duties. See *Robertson* v. *Sichel*, 127 U. S. 507, 515.

IV

Section 18 of the 1906 Act merely "authorizes" the Secretary of the Interior to bring suits on behalf of the Indians. It contains no undertaking by the United States to respond in damages in the event that such suits are not brought. Cf. *Pine Hill Co.* v. *United States*, 259 U. S. 191, 196. Contrary to assertions made by petitioners, they are not precluded by their wardship status from bringing suits on their own behalf. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 295. Section 18 of the 1906 Act specifically recognized the capacity of these tribes to sue, both before and after the passage of the Act.

V

Under the special jurisdictional Acts of 1924, the jurisdiction of the Court of Claims is limited to controversies "arising under or growing out" of a treaty, agreement, or Act of Congress. There was no obligation "arising under or growing out" of a treaty, agreement, or Act of Congress, as required (*Seminole Nation* v. *United States,* 316 U. S. 286), and suits based on a breach by the Government of the common law duty of a guardian toward its wards will not lie. *Choctaw and Chickasaw Nations* v. *United States,* 75 C. Cls. 494, 498. Special jurisdictional Acts are to be strictly construed and implications as to jurisdiction under their terms is forbidden. *Blackfeather* v. *United States,* 190 U. S. 368; *Price* v. *United States and Osage Indians,* 174 U. S. 373.

ARGUMENT

Introduction.—Petitioners' case proceeds upon the theory that by treaties and statutes the United States assumed certain liabilities in the nature of contractual obligations to the Indians; that it has not discharged these obligations; and that therefore petitioners have a valid cause of action against the Government for their breach. Under the treaties and statutes in question, lands granted by the tribes for rights of way and station grounds were to be paid for by the railroads and used for railroad purposes. The United States neither ex-

pressly nor impliedly promised to answer to the tribes if the railroads failed to carry out their obligations. The exercise by Congress of its power to legislate with respect to Indian affairs "does not necessarily involve the assumption of contractual obligations by the government. Their assumption is not to be presumed in the absence of any action taken by the government or on its behalf indicating such a purpose." *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421.

A fundamental error in petitioners' reasoning results from their confusing the concepts of *power* or authority in the United States to bring suits on behalf of Indian tribes or individual Indians and *obligation* to institute proceedings in their behalf. Obviously, the Government could have brought such suits as the petitioners think should have been brought, but it was not bound to do so by treaty or statute. Therefore, cases such as *Heckman* v. *United States*, 224 U. S. 413, *United States* v. *Osage County*, 251 U. S. 128, and *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339, relied upon by petitioners (Br. 27, 28, 32), in which the power of the United States to sue on behalf of Indians was challenged, are of no assistance in the determination of the instant issues. Here the question is whether the United States had incurred an obligation by treaty or statute to sue on behalf of the Indians rather than whether it had merely authority to do so. The existence of such an obligation is essential to a determination that Con-

gress in the jurisdictional Acts of 1924 has authorized the Court of Claims to entertain these suits, and if it has not, the courts cannot go beyond the language of the statutes. *Price* v. *United States and Osage Indians*, 174 U. S. 373; *Blackfeather* v. *United States*, 190 U. S. 368.

As indicating an assumption of contractual liability by the Government, petitioners refer to Article I of the treaties of 1866 in which the United States guaranteed the tribes "quiet possession of their country" (Br. 21–24); to Sections 15 and 16 of the Act of February 28, 1902, providing that the railroads should compensate the Indians for land taken and pay them, through the Secretary of the Interior, an annual charge per mile of railroad constructed (Br. 24–29); to Section 11 of the Act of April 26, 1906, directing that revenues due these tribes "be collected by an officer appointed by the Secretary of the Interior" (Br. 29, 30); and to Section 18 of the same Act authorizing the Secretary to bring suits to collect moneys due the tribes (Br. 29–32). But in none of these treaties or statutes was any such liability assumed[3] and therefore the jurisdictional Acts of 1924 would not apply. *Seminole Nation* v. *United States*, 316 U. S. 286; *United States* v. *Mil. Lac Chippewas*, 229 U. S. 498, 500; *United States* v. *Old Settlers*, 148 U. S. 427, 468, 469.

[3] Petitioners refer (Br. 33) to R. S. 2114 (25 U. S. C. 174). But that statute merely gives authority for the exercise of "general superintendence and care" of Indian tribes and casts no legal duty on the United States.

I

THE COVENANT OF "QUIET POSSESSION" IN THE TREATIES OF 1866 DID NOT BIND THE UNITED STATES TO RECOMPENSE THE INDIANS FOR INJURIES RESULTING FROM THE WRONGFUL USE BY THE RAILROADS OF LANDS GRANTED THEM FOR RAILROAD PURPOSES

Petitioners' principal contention is that the railroads, in using their "station reservations" for non-railroad purposes,[4] are in effect intruders; that the Government, in failing to oust the railroads from lands which they are unlawfully using, has breached its covenants in Article I of the 1866 treaties guaranteeing the Indians "quiet possession of their country"; and that the tribes are entitled to recover money damages from the United States for the resulting injuries (Br. 18–24). This contention is based on an erroneous interpretation of the 1866 treaties. Article I of the Creek Treaty, substantially the same as Article I of the Seminole Treaty, reads in part as follows:

> They [the Creek Indians] also agree to remain at peace with all other Indian tribes; and, in return, the United States guarantees

[4] The demurrers of course admit the truth of this allegation and all other facts well pleaded. They do not admit, as petitioners seem to think (Br. 19–20), that fencing the station reservations by the railroads constituted "unauthorized and unlawful intrusions"; that petitioners have no means of recovering in their own names the station reservations "but must rely upon the action of the United States"; and they admit no other conclusions of law.

> them quiet possession of their country, and protection against hostilities on the part of other tribes. * * *

Petitioners contend (Br. 21) that this Article guarantees the Creek nation quiet possession of its country *and* protection against hostilities of other tribes. Even granting additive effect to the word "and" (cf *Montello Salt Co.* v. *Utah*, 221 U. S. 452, 466), it is obvious from the context of the provision as a whole that it constituted an agreement that in consideration of the Creeks remaining at peace with all other Indian tribes, the United States would see that other tribes would not be permitted to occupy Creek land and that the Creeks would be protected if force were used by other Indians in an attempted intrusion.

The primary intent of the framers of this provision was to assure the Indians that they would be secure in their country from the encroachment of hostile Indians of other tribes. The language following the quoted provision makes this conclusion inescapable:

> In the event of hostilities, the United States agree that the tribe commencing and prosecuting the same, shall, as far as may be practicable, make just reparation therefor. To insure this protection, the Creeks agree to a military occupation of their country, at any time, by the United States, and the United States agree to station and continue in said country from time to time, at its own

expense, such force as may be necessary for that purpose. * * *

Article I of the Seminole Treaty is similar in this respect as well.

Certainly these provisions were not intended to apply to railroads. In Article V of the treaties the Creek and Seminole Nations agreed to allow railroads to be constructed across their domains, and specifically agreed to sell to the railroad companies three-mile strips of land on each side of the line of the roadbed. Having agreed that this land might be occupied by the railroads, it cannot logically be contended by the Indians that such occupancy would be a trespass constituting a breach of the covenant guaranteeing the Indians "quiet possession of their country".

The proviso in Article V that the land thus sold shall not be reconveyed, leased, or rented to anyone not a citizen of the Indian reservation has no bearing on the question of whether there has been a trespass. This language is nothing more than a directive to the railroad companies as to the use

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Clearly, the "covenant of quiet possession" is not to be treated as the technical "covenant of quiet enjoyment" found in many deeds. If it were so treated, it would not be violated by the actions of the railroads in the instant cases. An action for the breach of such a covenant can only be sustained where the person claiming its benefits has been prevented from taking possession or has been evicted by a person having a lawful and paramount title existing at the time the covenant was made. *Brown* v. *International Land Co.*, 29 Okla. 341, 344, 116 Pac. 799 (1911); *Pabst Brewing Co.* v. *Thorley*, 145 Fed. 117 (C. C. A. 2d), certiorari denied, 203 U. S. 597.

of the land after acquisition, noncompliance with which would be a matter of controversy between them and the Indians.

That the Government is not made liable in the courts, by a covenant of quiet possession, to respond in damages for injuries resulting from trespasses by third parties (it being assumed *arguendo* that the railroads stand in such a position) is squarely decided by the case of *Nez Percé Tribe* v. *United States*, 95 C. Cls. 1, certiorari denied, 316 U. S. 686. There it was provided by treaty that land should be set apart as an Indian reservation for the exclusive use and benefit of the Nez Percé Tribe and that no white man should "be permitted to reside upon the said reservation without permission of the tribe" (Article II of the Treaty of June 11, 1855, 12 Stat. 957, 958).* Certain white men went upon the reservation without permission and removed gold therefrom. The Indians sued the United States for the value of the gold upon the theory that it was the intent of the treaty that the United States guarantee that no white men should reside on the reservation and that the Government would respond in damages if they did. The court held that it was not intended by the treaty to impose on the United States any greater duty to protect the Indians in the peaceful occupation and possession of property than already existed and that it had not expressly assumed an

* This provision certainly is of no less effect than a covenant of quiet possession.

obligation to respond in damages if the protection afforded was not adequate. The court stated (p. 10) that such an obligation would not be implied unless such implication were inescapable and added (pp. 10–11):

> The treaty says that white persons shall not be permitted to reside on the reservation, but it does not say that if they do the United States shall be liable in damages for any injury done by them. * * *
>
> * * * * * *
>
> The agreement was intended to do no more than to make it as plain as possible that the reservation was intended for the sole use and benefit of the tribe and that the defendant would do what it could to effect that, or, failing in this, to afford plaintiff redress in its courts against the wrongdoer.

Even in the case of trespasses by hostile Indians, all the Government agreed to in the treaties of 1866 was that the hostile tribe should make just reparation therefor (see Article I of each treaty). The duty of the United States in such a contingency obviously would not go beyond the application of pressure upon the hostile tribe to make restitution; otherwise, the language of the treaties would have so provided. Plainly, there was no contract of guarantee. Cf. *Leighton* v. *United States*, 161 U. S. 291, 296.

The case of *United States* v. *Creek Nation*, 295 U. S. 103, relied upon by petitioners (Br. 22–23, 30–31) is authority only for the point that the United States is liable for its own intrusions and

takings, not for those of others. There is nothing decided, said, or even intimated in that case which would indicate that by the language of Article I of the treaties of 1866 the Government intended to subject itself to a suit for damages for alleged wrongs inflicted by third parties upon these tribes.

II

THE UNITED STATES, UNDER THE ACT OF FEBRUARY 28, 1902, DID NOT UNDERTAKE TO BE LIABLE FOR SUMS WHICH MIGHT BE DUE THE INDIANS FROM THE RAILROADS

Petitioners contend (Br. 24–29) that since the railroads failed to pay them compensation for land taken for rights of way and did not pay to the Secretary of the Interior the annual charge of $15[1] per mile of railroad constructed, as required by Sections 15 and 16 of the Act of February 28, 1902, it became the duty of the United States to collect these sums and that the Government is liable to the appellants for its failure to do so. This contention is without merit. Nowhere does it appear in this statute that the United States undertook to collect these amounts or to be liable to the Indians for failure to do so. The naming in Section 16 of

[1] An Opinion of the Secretary of Interior (38 L. D. 414, 417 (1910)) ruled that liability of the railroads to pay this annual charge ceased upon admission of Oklahoma to statehood. The Secretary stated that the charge, "in the nature of a franchise tax or charge upon the business of the corporation constructing the road" payable to the nations, was exacted by Congress at a time when there was no state or territorial government and that Congress intended it to be paid to the nations only while they were exercising the func-

the Secretary of the Interior as a depositary for the payment of the annual mileage charge was not coupled with a promise to be liable for these sums if they were not paid to that officer. This Court has held that the exercise by Congress of its plenary power over Indians "does not necessarily involve the assumption of contractual obligations by the government. Their assumption is not to be presumed in the absence of any action taken by the government or on its behalf indicating such

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tions of a political government. The Opinion required the railroads to pay the charges which had accrued on November 16, 1907, the date that the state was admitted.

Moreover, three suits have been brought recently on behalf of the Osage Indians seeking, first, to collect annual charges of $15 per mile of railroad constructed, allegedly due pursuant to Section 16 of the 1902 Act and, second, damages for the alleged use of portions of the rights of way for non-railroad purposes in contravention of Section 14 of the 1902 Act and Section 2 of the Act of March 2, 1899, (30 Stat. 990). Two of the cases held that the requirement for payment of the charges ceased upon the execution and delivery of allotment deeds to the Osage Indians in 1909 and that the rights of way had not been improperly used (*United States* v. *Midland Valley Railroad Co.*, United States District Court for the Northern District of Oklahoma, decided November 19, 1942, not reported; *United States* v. *Missouri, Kansas, Texas Railroad Co.*, United States District Court for the Northern District of Oklahoma, decided October 7, 1942, not reported). The third is pending, but, according to the United States Attorney, the district judge announced from the bench on August 31, 1942, that the defendant railroad would not be liable for the $15 charge because the road was constructed under the Act of 1899, the relevant section (sec. 5) of which applied only to the "Indian Territory" and excluded the Osage Reservation (*United States* v. *Sante Fe Railroad Co.*, pending, United States District Court for the Northern District of Oklahoma).

a purpose." *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421. Cf. *Turner* v. *United States*, 248 U. S. 354, 359. The assertion of petitioners (Br. 26) that "the Act of February 28, 1902 was an arrangement made by the United States directly with the railroads" is of no moment. A parallel situation existed in *United States* v. *Algoma Lumber Co.*, 305 U. S. 415.

III

SECTION 11 OF THE ACT OF APRIL 26, 1906, PROVIDING FOR THE COLLECTION BY A GOVERNMENT AGENT OF REVENUES DUE THE TRIBES, DOES NOT MAKE THE UNITED STATES LIABLE FOR SUMS WHICH THE AGENT FAILS TO COLLECT.

The 1906 Act was a comprehensive statute for the final disposition of the affairs of the Five Civilized Tribes, passed at a time when the dissolution of the tribal governments was believed to be imminent. *Tally* v. *Burgess*, 246 U. S. 104, 107; H. Rep. 183, 59th Cong., 1st sess. Section 11 provided that all revenues accruing to the Five Tribes "before or after dissolution of the tribal governments" should be collected by an officer appointed by the Secretary of the Interior. As a corollary he was authorized to pay lawful claims against the tribes. The action of Congress must be viewed as a means chosen for the exercise of the power of the Government to protect the rights of the Indians, in view of the expected dissolution of their Governments. The means were adapted to that end. Because of this prospective

dissolution, some provision was necessary for collecting revenues due the tribes and disbursing payments to persons with legitimate claims. The tribal governments being dissolved, there would be no tribal treasurers, and the effect of this provision was to substitute a treasurer appointed by the United States for those who were selected by the tribes and would no longer hold office. Section 11 was not a contract made with the Indians to collect all moneys owed the tribes but was simply an incidental part of the machinery for dissolution of the tribal governments. As such, it constituted only an intragovernmental direction to officers of the United States. Cf. *The Sac and Fox Indians*, 220 U. S. 481.

Surely Congress did not intend by Section 11 of the 1906 Act to make the Government liable for all moneys which its officers failed to collect, for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs. See *Robertson* v. *Sichel*, 127 U. S. 507, 515.

IV

SECTION 18 OF THE ACT OF APRIL 26, 1906, AUTHORIZING THE SECRETARY OF THE INTERIOR TO BRING SUITS ON BEHALF OF THE TRIBES, DOES NOT MAKE THE UNITED STATES LIABLE IN DAMAGES FOR HIS FAILURE TO BRING SUCH SUITS.

There can be no doubt that under the treaties of 1866 and the Acts passed pursuant thereto, providing for the acquisition by the railroads of

rights of way and station grounds, the tribes themselves were to take the steps necessary to protect their interests. For example, Section 10 of the Act of July 26, 1866, 14 Stat. 289, 291 (n. 1, *supra*), clearly contemplates that any negotiations looking toward the acquisition of lands by the railroads were to be conducted by the Indians. Similarly, the Act of 1902 provides a full and complete remedy in case of controversy between the Indians and the railroad companies in connection with the valuation of lands taken by the railroads for right of way and station purposes (sec. 15). In none of these treaties or statutes is the United States looked to as a party to the proceedings. Instead, it was intended that the tribes themselves would bring whatever suits were necessary to enforce their rights under the 1866 treaties and the 1902 Act.

Petitioners contend (Br. 29–30) that all this was changed by Section 18 of the Act of April 26, 1906, 34 Stat. 137, authorizing the Secretary of the Interior to bring suits to collect any money due or recover land belonging to any of the Five Civilized Tribes. This section is permissive and not compulsory, for it merely "authorizes" the Secretary of the Interior to bring suits on behalf of the tribes. It imposes no legal, mandatory duty on him, nor does it make the United States liable in damages for his failure to bring such suits. Cf. *Pine Hill Co.* v. *United States*, 259 U. S. 191, 196. If Congress had intended to make obliga-

tory the filing of a suit by the Secretary, it could easily have used language to have accomplished that purpose. "The courts may not supply the words which Congress omitted. Nor can such course be induced by any consideration of public policy or the desire to promote justice, if such would be its effect, in dealing with dependent people." *United States* v. *First National Bank*, 234 U. S. 245, 262.

The remedy of petitioners was to sue the railroads if they had a valid claim for injuries suffered as a result of unwarranted encroachment by the railroads on their property or for the failure of the railroads to pay for the land taken or to pay mileage fees. But petitioners contend that they were under the disability of being dependent wards of the Government with no power to bring suit and that the United States as their guardian should have sued for them (Br. 15, 30). However, the tribes are neither precluded by their wardship status nor by the 1902 and 1906 Acts from bringing suits on their own behalf. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 295.[8] In fact, Section 18 of the 1906 Act specifically recognized the ca-

[8] Tribal capacity to sue is implied in the various right of way statutes which permit appeals from administrative decisions on the amount of damages due for tribal property taken or damaged. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641; see Section 15 of the 1902 Act.

pacity of these tribes to sue both before and after its enactment.[9]

V

THE COURT OF CLAIMS HAS NO JURISDICTION OF SUITS NOT BASED ON A TREATY OR STATUTORY OBLIGATION

For a controversy to be justiciable by virtue of the special jurisdictional Acts of 1924, under which these suits were brought, it must be one "arising under or growing out" of a treaty, agreement or Act of Congress.[10] Clearly, the quoted language means that the foundation of the suit must be based on a positive obligation incurred by the United States in a treaty, agreement or Act of Congress. Of such a nature were the claims involved in *Seminole Nation* v. *United States*, 316 U. S. 286. See also *United States* v. *Mil. Lac Chippewas*, 229 U. S. 498, 500; *United States* v.

[9] Section 18 provides in part:

> Where suit is *now pending, or may hereafter be filed* in any United States court in the Indian Territory, *by* or on behalf of *any one or more of the Five Civilized Tribes* * * *. [Italics supplied.]

[10] The Act of August 16, 1937, 50 Stat. 650, did not, as petitioners contend (Br. 21), extend the jurisdiction of the Court of Claims and make it unnecessary that claims presented by an amended petition must have an express foundation in treaties and Acts of Congress. That Act was passed to meet the holding of this Court in *United States* v. *Seminole Nation*, 299 U. S. 417, and by it no obligation was "undertaken by the United States beyond the provisions of the various original jurisdictional acts". Sen. Rep. 715, 75th Congress, 1st sess.; 81 Cong. Rec. 8007.

Old Settlers, 148 U. S. 427, 468, 469; *Delaware Tribe of Indians* v. *United States*, 84 C. Cls. 535, 539; *Klamath & Moadac Tribes* v. *United States*, 81 C. Cls. 79, 92–93, affirmed, 296 U. S. 244; *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494. To hold otherwise would lead to an absurd result, for any claim involving an Indian could be said to have its genesis in the fact that at some time Congress passed an Act or ratified a treaty bearing in some degree on the Indian engaged in suit.

It has been shown that there is no treaty or Act of Congress wherein the Government assumed liabilities of the character claimed. Petitioners therefore are remitted for a cause of action to an alleged duty cast upon the Government by reason of its relationship to them. The jurisdictional Acts, however, do not confer on the Court of Claims jurisdiction of causes of action "predicated upon the common law liabilities pertaining to the relationship of guardian and ward." *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, 498.[11] Special jurisdictional Acts are to be strictly construed and implications as to jurisdiction under their terms is forbidden. *Blackfeather*

[11] "It is clear that this relationship [guardian and ward] does not exist between the United States and the Indians, although there are important similarities and suggestive parallels between the two relationships." Cohen, *Handbook of Federal Indian Law* (1942), p. 169.

v. *United States*, 190 U. S. 368; *Price* v. *United States and Osage Indians*, 174 U. S. 373. In the latter case this Court said (p. 375):

> The right of the plaintiff to recover is a purely statutory right. The jurisdiction of the Court of Claims cannot be enlarged by implication. It matters not what may seem to this court equitable, or what obligation we may deem ought to be assumed by the Government, or the Indian tribe, whose members were guilty of this depredation, we cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume. * * *

Once a treaty or statutory obligation is established, equitable considerations may be adverted to looking toward the "moral obligations of the highest responsibility and trust" which the Government bears towards the Indians. *Seminole Nation* v. *United States*, 316 U. S. 286, 297. There must first be established, however, a treaty or statutory basis for those obligations, and the last-cited case proceeds upon that principle. If Congress has not seen fit to establish an obligation and specify the cases and contingencies in which the liability of the Government is submitted for judicial determination, the courts may not substitute their judgment for that of Congress, which has an absolute discretion over the liability of the United States to suit. *Schillinger* v. *United States*, 155 U. S. 163,

166. Questions as to the policy of the Government in its relationship with Indian tribes, their lands, and property are political and not judicially cognizable.

CONCLUSION

It is respectfully submitted, therefore, that the judgments of the Court of Claims dismissing the complaints for their failure to state causes of action against the United States and for want of jurisdiction are correct and should be affirmed.

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DECEMBER 1942.

APPENDIX

Articles I and V of the Treaty of March 21, 1866, 14 Stat. 755, 757–758, between the Seminole Nation and the United States provide:

> ARTICLE I. There shall be perpetual peace between the United States and the Seminole nation, and the Seminoles agree to be and remain firm allies of the United States, and always faithfully aid the government thereof to suppress insurrection and put down its enemies.
>
> The Seminoles also agree to remain at peace with all other Indian tribes, and with themselves. In return for these pledges of peace and friendship, the United States guarantee them quiet possession of their country, and protection against hostilities on the part of other tribes; and in the event of such hostilities, that the tribe commencing and prosecuting the same shall make just reparation therefor. Therefore the Seminoles agree to a military occupation of their country at the option and expense of the United States.
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> * * * * *
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> ARTICLE V. The Seminole nation hereby grant a right of way through their lands to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point on their eastern to their western or southern boundary; but said railroad company, together with all its agents and employes, shall be subject to the

laws of the United States relating to the intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior, for that purpose. And the Seminoles agree to sell to the United States, or any company duly authorized as aforesaid, such lands not legally owned or occupied by a member or members of the Seminole nation lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such price per acre as may be eventually agreed upon between said Seminole nation and the party or parties building said road—subject to the approval of the President of the United States: *Provided, however,* That said land thus sold shall not be reconveyed, leased, or rented to, or be occupied by, any one not a citizen of the Seminole nation, according to its laws and recognized usages: *Provided, also,* That officers, servants, and employes of said railroad necessary to its construction and management shall not be excluded from such necessary occupancy, they being subject to the provisions of the Indian intercourse laws, and such rules and regulations as may be established by the Secretary of the Interior; nor shall any conveyance of said lands be made to the party building and managing said road, until its completion as a first-class railroad and its acceptance as such by the Secretary of the Interior.

Articles I and V of the Treaty of June 14, 1866, 14 Stat. 785, 786, 787–788, between the Creek Nation and the United States, provide:

ARTICLE I. There shall be perpetual peace and friendship between the parties

to this treaty, and the Creeks bind themselves to remain firm allies and friends of the United States, and never to take up arms against the United States, but always faithfully to aid in putting down its enemies. They also agree to remain at peace with all other Indian tribes; and, in return, the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes. In the event of hostilities, the United States agree that the tribe commencing and prosecuting the same, shall, as far as may be practicable, make just reparation therefor. To insure this protection, the Creeks agree to a military occupation of their country, at any time, by the United States, and the United States agree to station and continue in said country from time to time, at its own expense, such force as may be necessary for that purpose. * * *

* * * * * *

ARTICLE V. The Creek nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employees, shall be subject to the laws of the United States relating to intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secre-

tary of the Interior for that purpose, and the Creeks agree to sell to the United States, or any company duly authorized as aforesaid, such lands not legally owned or occupied by a member or members of the Creek nation, lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such price per acre as may be eventually agreed upon between said Creek nation and the party or parties building said road, subject to the approval of the President of the United States: *Provided, however,* That said land thus sold shall not be reconveyed, leased, or rented to, or be occupied by any one not a citizen of the Creek nation, according to its laws and recognized usages: *Provided, also,* That officers, servants, and employes of said railroad necessary to its construction and management, shall not be excluded from such necessary occupancy, they being subject to the provisions of the Indian intercourse law and such rules and regulations as may be established by the Secretary of the Interior, nor shall any conveyance of any of said lands be made to the party building and managing said road until its completion as a first-class railroad, and its acceptance as such by the Secretary of the Interior.

Sections 13–16 of the Act of February 28, 1902, 32 Stat. 43, 47–49, provide:

SEC. 13. That the right to locate, construct, own, equip, operate, use, and maintain a railway and telegraph and telephone line or lines into, in, or through the Indian Territory, together with the right to take and condemn lands for right of way, depot grounds, terminals, and other railway pur-

poses, in or through any lands held by any Indian tribe or nation, person, individual, or municipality in said Territory, or in or through any lands in said Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any railway company organized under the laws of the United States, or of any State or Territory, which shall comply with this Act.

SEC. 14. That the right of way of any railway company shall not exceed one hundred feet in width except where there are heavy cuts and fills, when one hundred feet additional may be taken on each side of said right of way; but lands additional and adjacent to said right of way may be taken and condemned by any railway company for station grounds, buildings, depots, side tracks, turnouts, or other railroad purposes not exceeding two hundred feet in width by a length of two thousand feet. That additional lands not exceeding forty acres at any one place may be taken by any railway company when necessary for yards, round-houses, turntables, machine shops, water stations, and other railroad purposes. And when necessary for a good and sufficient water supply in the operation of any railroad, any such railway company shall have the right to take and condemn additional lands for reservoirs for water stations, and for such purpose shall have the right to impound surface water or build dams across any creek, draw, canyon, or stream, and shall have the right to connect the same by pipe line with the railroad and take the necessary grounds for such pur-

poses; and any railway company shall have the right to change or straighten its line, reduce its grades or curves, and locate new stations and to take the lands and right of way necessary therefor under the provisions of this Act.

SEC. 15. That before any railroad shall be constructed or any lands taken or condemned for any of the purposes set forth in the preceding section, full compensation for such right of way and all land taken and all damage done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes, shall be made to the individual owner, occupant, or allottee of such lands, and to the tribe or nation through or in which the same is situated: *Provided*, That correct maps of the said line of railroad in sections of twenty-five miles each, and of any lands taken under this Act, shall be filed in the Department of the Interior, and shall also be filed with the United States Indian agent for Indian Territory, and with the principal chief or governor of any tribe or nation through which the lines of railroad may be located or in which said lines are situated.

In case of the failure of any railway company to make amicable settlement with any individual owner, occupant, allottee, tribe, or nation for any right of way or lands or improvements sought to be appropriated or condemned under this Act, all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, or nation by reason of the appropriation and condemnation of said right of way, lands, or improvements shall be determined by the appraisement of three disinterested referees, to be appointed by the judge of the United States court, or other court of juris-

diction in the district where such lands are situated, on application of the corporation or other person or party in interest. Such referees, before entering upon the duties of their appointment shall each take and subscribe, before competent authority, an oath that he will faithfully and impartially discharge the duties of his appointment, which oaths, duly certified, shall be returned with the award of the referees to the clerk of the court by which they were appointed. The referees shall also find in their report the names of the person and persons, tribe, or nation to whom the damages are payable and the interest of each person, tribe, or nation in the award of damages. Before such referees shall proceed with the assessment of damages for any right of way or other lands condemned under this Act, twenty days' notice of the time when the same shall be condemned shall be given to all persons interested, by publication in some newspaper in general circulation nearest said property in the district where said right of way or said lands are situated, or by ten days' personal notice to each person owning or having any interest in said lands or right of way: *Provided*, That such notice to any tribe or nation may be served on the principal chief or governor of the tribe. If the referees can not agree, then any two of them are authorized to and shall make the award. Any party to the proceedings who is dissatisfied with the award of the referees shall have the right, within ten days after the making of the award, to appeal, by original petition, to the United States court, or other court of competent jurisdiction, sitting at the place nearest and most convenient to the property sought to be taken, where the question of the damages occa-

sioned by the taking of the lands in controversy shall be tried de novo, and the judgment rendered by the court shall be final and conclusive, subject, however, to appeal as in other cases.

When the award of damages is filed with the clerk of the court by the referees, the railway company shall deposit the amount of such award with the clerk of the court, to abide the judgment thereof, and shall then have the right to enter upon and take possession of the property sought to be condemned: *Provided*, That when the said railway company is not satisfied with the award, it shall have the right, before commencing construction, to abandon any portion of said right of way and adopt a new location, subject, however, as to such new location, to all the provisions of this Act. Each of the referees shall receive for his compensation the sum of four dollars per day while actually engaged in the appraisement of the property and the hearing of any matter submitted to them under this Act. Witnesses shall receive the fees and mileage allowed by law to witnesses in courts of record within the districts where such lands are located. Costs, including compensation of the referees, shall be made part of the award or judgment and be paid by the railway company: *Provided*, That if any party or person other than the railway company shall appeal from any award, and the judgment of the court does not award such appealing party or person more than the referees awarded, all costs occasioned by such appeal shall be paid by such appealing party or person.

SEC. 16. That where a railroad is constructed under the provisions of this Act there shall be paid by the railway company

to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise provided herein; and the grants herein are made upon the condition that Congress hereby reserves the right to regulate the charges for freight and passengers on said railways and messages on all telegraph and telephone lines until a State government or governments shall exist in said Territory within the limits of which any railway shall be located; and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by such railways; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railways whenever such transportation shall extend from one State into another, or shall extend into more than one State; and that the railway companies shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of compensation.

Sections 11 and 18 of the Act of April 26, 1906, 34 Stat. 137, 141, 144, provide:

SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer ap-

pointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: *Provided,* That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundred and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded.

* * * * *

SEC. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the

tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits: *Provided*, That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him.

Section 1 of the Seminole jurisdictional Act of May 20, 1924, 43 Stat. 133, provides:

* * * That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any Act of Congress in re-

lation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

Section 1 of the Creek jurisdictional Act of May 24, 1924, 43 Stat. 139, provides:

> * * * That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States: *Provided, however,* That the provisions of this Act shall not be construed to confer jurisdiction upon the court to hear, examine, consider, and adjudicate any balance claimed to be due on the so-called Loyal Creek claim, or any amount claimed to be due to equalize allotments among members of the Creek Tribe.

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